1999 WL 34822116 (Hawai'i Cir.Ct.) (Trial Motion, Memorandum and Affidavit)
Circuit Court of Hawai'i,
First Circuit.

Grace Tomoyo MOCK, Plaintiff,

v.

DEPARTMENT OF HEALTH, State of Hawaii, Fred Horwitz, Individually and in his capacity as the Administrator of Leahi Hospital, Carlina Rivera, Individually and in her capacity as the Head Nurse, Young 4, Leahi Hospital, Lily Arista, Kauionalani Castillo, Encarnacion Castro, Carmelita Rodriguez, Leonila Stone, Pauline Yuen, John Does 1 to 10 and Jane Does 1 to 10, Defendants.

No. 97-1614-04.
May 3, 1999.

Non-Motor Vehicle Tort

Re: Defendants Department of Health, State of Hawaii; Fred Horwitz, Individually and in His Capacity as the Former Administrator of Leahi Hospital; Carlina Rivera, Individually and in Her Capacity as the Head Nurse, Young 4, Leahi Hospital; Lily Arista; Kauionalani Castillo; Encarnacion Castro; Carmelita Rodriguez; Leonila Stone; and Pauline Yuen's Motion for Directed Verdict

Memorandum in Support of Motion

Kenneth S. Robbins, Vincent A. Rhodes, Charla J.H. Murakami, William N. Ota, Shinken Naitoh, Attorneys for Defendants, Department of Health State of Hawaii, Fred Horwitz, Individually and in His Capacity as the Administrator of Leahi Hospital, Carlina Rivera, Individually and in Her Capacity as the Head Nurse, Young 4, Leahi Hospital, Lily Arista; Kauionalani Castillo; Encarnacion Castro; Carmelita Rodriguez; Leonila Stone, and Pauline Yuen.

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I. *INTRODUCTION.*

Plaintiff Grace Mock ("Plaintiff") filed the instant lawsuit on April 22, 1997, against the state of Hawaii Department of Health, Fred Horwitz, a former administrator of Leahi Hospital ("Hospital"), and Carlina Rivera, Head Nurse of Young 4 Ward of the Hospital. Plaintiff alleged that the actions taken by the Hospital against her were in retaliation for critical statements she made to the news media regarding the Department of Health and her earlier reports to her supervisors that other Hospital personnel were sleeping on the job. She subsequently amended her complaint twice to add numerous defendants and claims. Her second amended complaint filed September 15, 1998, indicates her claims in this lawsuit to be as follows:
1) Defendants Horwitz and Rivera ("Hospital Defendants") violated Hawaii Whistleblower's Protection Act, Sections 378-61 et. seq.;

2) Defendants Horwitz and Rivera violated Plaintiff's rights under Article I, Section 4 of the Hawaii State Constitution and under the First and Fourteenth Amendments to the United States Constitution, thus giving rise to a 42 U.S.C. Section 1983 claim;

3) Defendants Arista, Castillo, Castro, Rivera, Rodrigues, Stone, and Yuen ("Conspiracy Defendants") conspired to violate Plaintiff's rights under HWPA, Article I, Section 4 of the Hawaii State Constitution, and the First and Fourteenth Amendments to the U.S. Constitution;

4) Defendants Arista, Castillo, Castro, Rivera, Rodrigues, and Stone ("Defamation Defendants") defamed her; and

5) Plaintiff is entitled to punitive damages.

Defendants respectfully request that this Court direct a verdict in their favor and against Plaintiff on all the foregoing claims for reasons stated hereinbelow.

II. *STANDARD ON A MOTION FOR DIRECTED VERDICT.*

The Hawaii Supreme Court in *Collins v. Greenstein,* 61 Haw. 26, 38, 595 P.2d 275 (1979), articulated the standard on a motion for directed verdict as follows:

> [T]he evidence and the inferences which may be fairly drawn from the evidence must be considered in the light most favorable to the party against whom the motion is directed and if the evidence and the inferences viewed in that manner are of such character that reasonable persons in the exercise of fair and impartial judgment may reach different conclusions upon the crucial issue, then the motion should be denied and the issue should be submitted to the jury.

Quoting Young v. Price, 47 Haw. 309, 313, 388 P.2d 203, 206 (1963); *Farrior v. Payton,* 57 Haw. 620, 626, 562 P.2d 779, 784 (1977).

The standard for directed verdict reflects the same standard that governs summary judgment. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 250, 106 S. Ct. 2505, 2512 (1986). In that context, the Hawaii Intermediate Court of Appeals has held that while negligence and proximate cause are ordinarily not susceptible to summary judgment,

where the facts are undisputed *or are susceptible of only one reasonable interpretation*, the trial court is under a duty to pass upon the question of negligence or proximate cause as a matter of law.

(Emphasis added.)

Cordeiro v. Burns, 7 Haw. App. 463, 466, 776 P.2d 411 (1989), *quoting De Los Santos v. State*, 65 Haw. 608, 610, 655 P.2d 869 (1982); *see also Henderson v. Professional Coatings Corp.*, 72 Haw. 387, 400, 819 P.2d 84, 86 (1991).

III. *SUMMARY OF ARGUMENT.*

First, all Defendants except Pauline Yuen are qualifiedly immune from liability because the challenged conduct and statements constituted good faith participation in the making of a report of patient neglect.

Second, the Hospital Defendants as a matter of law did not violate Plaintiff's right to freedom of speech, a right protected under both the U.S. and the Hawaii state constitution, because the evidence before this Court is susceptible of only one reasonable interpretation -- that Plaintiff's speech was neither a substantial nor motivating factor in the Hospital's challenged action, and that the Hospital's challenged action taken against Plaintiff was justified. Because Plaintiff fails to establish that her constitutional right was violated, her claim for the alleged violation of her civil rights based upon 42 U.S.C. Section 1983 fails.

Third, as a matter of law, the Hospital Defendants did not violate Hawaii's Whistleblower Protection Act (HWPA), H.R.S. Sections 378-661 et seq. Plaintiff's second amended complaint primarily alleges her public statement to the media to be the report to the “public body” protected under HWPA. However, as this Court has already ruled, the media, except KHET, is not a public body. Therefore, any report to the media is not protected conduct under HWPA. Of course, the fact that her employer or a public body heard or read the media report does not convert otherwise unprotected conduct into protected conduct.

Even assuming, *arguendo*, that Plaintiff engaged in protected conduct other than her report to the media, her HWPA claim still fails as a matter of law. That is because the evidence before this Court is susceptible of only one reasonable interpretation, that the Hospital's action challenged by Plaintiff was not taken because Plaintiff engaged in a protected conduct, but that it was taken in response to the reports of neglect submitted by her co-employees at the Hospital.

Fourth, Plaintiff's conspiracy claim fails as a matter of law. Under Hawaii law, there is no civil claim based upon a conspiracy alone -- there must be an actionable underlying claim. Because the underlying claims fail for reasons stated in the foregoing and discussed hereinbelow, Plaintiff's conspiracy claim based on those underlying claims also fails.

Fifth, Plaintiff's defamation claim fails as a matter of law, because the reports of neglect of an **elderly** resident at the Hospital, which form the basis for Plaintiff's defamation claim, are qualifiedly privileged. To overcome the privilege, Plaintiff must establish that the privilege was **abused**. Yet, other than Plaintiff's bold allegations, there is no evidence of such **abuse** before this Court.

Sixth, Plaintiff's claim for punitive damages fails as a matter of law, because there is no evidence before this Court, much less clear and convincing evidence, that alleged acts or omissions of any of the Defendants rose to the level of wrongdoing required under Hawaii law for the imposition of punitive damages.

Seventh, Plaintiff's claim for lost wages, seniority, overtime, and any other employment benefits fails as a matter of law because there is no evidence supporting this claim.

IV. *ARGUMENT.*

A. DEFENDANTS ARE IMMUNE FROM CIVIL LIABILITY UNDER H.R.S. *SECTION 346-250.*

It is uncontroverted that the Department of Human Services investigated the neglect at issue in the instant case. Sylvia Sugimoto confirmed this. It is further uncontroverted that the investigation was triggered by the report of neglect that was submitted to the Department of Human Services. It is also uncontroverted that such a report to the Department of Human Services was necessary and appropriate. Indeed, Sylvia Sugimoto testified that the report was appropriate and all who participated did so in good faith.
Q: ... Okay, now, for the record, I'm showing you Exhibit 62, something that is stated that you wrote, "Leahi made appropriate referral to Adult Protective Services," and then you put APS. Do you see that?

A: Hm-hmm.

Q: What did you mean by that?

A: That whoever made the report believed that there was -- you know, that neglect occurred, so it was appropriate for them to make a report to us.

Q: Okay. When you conducted your investigation, was it your conclusion that those who came forward and reported what they observed did so in good faith?

A: Yes.

TR 4/22/99: 90:6-18 (attached as Exhibit "A"). Moreover, evidence is uncontroverted that all Defendants with the exception of Pauline Yuen participated in the process which led to that report to the Department of Human Services.

Under H.R.S. Section 346-224, "nurses and other health related professionals" and "[e]mployees or officers of any public ... institution providing ... hospital ... services" who "in the performance of their professional or official duties, know or have reason to believe that a dependent adult has been **abused** and is threatened with imminent **abuse**" have a duty to "promptly report the matter orally to the Department of Human Services." H.R.S. Section 346-222 defines "**abuse**" to include failure to "assist in personal hygiene" and to provide "in a timely manner ... physical care, medical care, or supervision." H.R.S. Section 346-224(e) provides for criminal liability for knowing failure to report any **abuse** of a dependent adult to the Department of Human Services:

> Any person who knowingly fails to report as required by this section or who wilfully prevents another person from reporting pursuant to this section shall be guilty of a petty misdemeanor.

H.R.S. Section 346-250 provides qualified immunity to such participants:

> Anyone *participating* in good faith in the making of a report pursuant to this part shall have immunity from any liability, civil or criminal, that might be otherwise incurred or imposed by or as a result of the making of such a report. Any participant shall have the same immunity with respect to participation in any judicial proceeding resulting from that report. (Emphasis added.)

Therefore, under the clear language of the statute, immunity applies not only to those who make the report, but to those who participate in the making of the report. Obviously, in an institutional setting, a report to the Department of Human Services is not necessarily made by all those involved in the process of identifying the neglect required to be reported under the statute.

Yet, those who initially identify the neglect, those who suggest that the neglect be reported, those who discuss the matter, and those who participate in interviews with APS, among others, are as much a participant in the making of the report as those who actually make the report. [1] Thus, the statute does not state that anyone making a report pursuant to this part shall be immunized; instead, it states that anyone participating in the making of a report shall be immunized. Construing the statute to immunize only those who actually report the neglect to the Department of Human Services would undermine the public policy which underlies the statute -- to protect the **elderly** from neglect -- and defeat the purpose of the immunity provision -- to encourage such reporting of neglect. Immunity thus applies to all participants in the making of the report, as Defendants (except Pauline Yuen) were in the instant case.

Also, that those who participated in the making of the report also participated in an internal investigation by the Hospital does not deprive them of the immunity under the statute. There is no dispute that all of Plaintiff's claims against Defendants are triggered by the sequence of events following the reported neglect -- which led to the investigation by the Department of Human Services and the internal investigation by the Hospital. Thus, alleged civil liability which Plaintiff attempts to impose upon Defendants is "as a result of the making of such a report." It is precisely such alleged liability to which the statutory qualified immunity applies.

Plaintiff may overcome qualified immunity by establishing that Defendants acted in bad faith. While the issue of whether or not one acted in good faith is generally a question of fact for the jury, in the instant case, other than blanket allegations of Plaintiff, there is no evidence before this Court to indicate that Defendants acted in bad faith. Defendants therefore respectfully request this Court to direct a verdict in favor of all Defendants except for Pauline Yuen based on their immunity to civil liability under H.R.S. Section 346-250.

B. AS A MATTER OF LAW, THE HOSPITAL DEFENDANTS DID NOT VIOLATE PLAINTIFF'S RIGHT TO FREEDOM OF SPEECH, AND *THUS HER CLAIM UNDER 42 U.S.C. SECTION 1983 FAILS.*

1. The Hospital Defendants did not violate Plaintiff's right to freedom of speech because the Hospital's action that Plaintiff challenges was not taken because of any of her protected *expression.*

The Hawaii Supreme Court in *Crosby v. State Dept. of Budget & Finance*, 76 Hawai'i 332 (1994), 876 P.2d 1300, has articulated the law regarding the initial burden of a plaintiff who claims that the employer's action violates the speech clause of the first amendment. In that case, Crosby, an employee of the State Department of Budget and Finance ("State employer"), was assigned the task of preparing specifications to facilitate the hiring of a consultant to conduct a comprehensive management study. Crosby concluded that state law mandated selection of a consultant for this project through competitive bid. However, the State employer decided that the selection procedure could be "non-bid," and Crosby's supervisor directed him accordingly. Crosby continued to assert his conviction that a "non-bid" process violated the law. He was subsequently removed from the project and reassigned, because his employer concluded his continued objection was adversely affecting the progress of the project and creating tension.

Crosby subsequently initiated a lawsuit against his State employer, alleging, among other things, that he was removed from the project for expressing that his State employer's conduct violated the state law, and thus, the State's action violated his right to freedom of speech. The trial court found that there was no violation of his First Amendment rights, concluding that Crosby was not removed from the project because of his expression. The Supreme Court of Hawaii, in affirming this conclusion of the trial court, articulated applicable law as follows:

> The law in this area is well-settled. A public employee claiming that an employer's action violates the speech clause of the first amendment bears the initial burden of making a prima facie showing that 1) the conduct was constitutionally protected, and 2) the conduct was a "substantial" or "motivating" factor in the government's decision to take the challenged action.

Crosby, 876 P.2d at 1311, *citing Mt. Healthy v. Doyle*, 429 U.S. 274, 97 S. Ct. 568, 50 L. Ed. 2d 471 (1977) (attached as Exhibit "C").

The *Crosby* court then explained:

> Although Crosby's expression was inextricably intertwined with his removal from the project, there is substantial, credible evidence to justify a reasonable conclusion that the State's primary motive in removing Crosby for the project was to ensure that the project was completed expeditiously.

In the instant case, evidence before this Court is susceptible of only one reasonable interpretation, that Plaintiff's speech was neither a substantial nor a motivating factor in the Hospital's challenged action. The Hospital transferred Plaintiff to the Dietary Unit because of the reported neglect of an **elderly** resident.

Fred Horwitz testified that Department of Health-Division of Community Hospitals Policies and Procedures, as well as other documents and policies, required removal of a nurse from patient care when reported for neglect.
Q: (By Mr. Ikei:) On January 28th, 1997, you signed a letter and sent it certified mail/return receipt requested to Grace Mock; did you not?

A: Yes, I did.

Q: And in that letter you advised her in writing that she had been accused of patient -- there had been a report of patient neglect and that she was reassigned to the Dietary Department?

A: That's correct.

Q: And you took this action to comply with the **abuse** and neglect policy on -- or the policy of Leahi Hospital in the investigation, the Reporting, Investigation and Disposition of Incidents of Patient **Abuse** and Neglect; is that correct?

A: I believe that was the title of the report you gave me, and that was one of the documents or policies that govern these type of actions.

THE COURT: Would you please summarize quote other documents end quote and quote standards end quote you used in the reassignment of Mrs. Mock.

THE WITNESS: There are besides the policy and procedures that were set up for the Division of Community Hospitals, Leahi Hospital is both certified and licensed under Medicare laws as well as medicaid laws, rules and we are governed by those also as well as collective bargaining.

TR 4/23/99: 31:12-32:3; 138: 6-14 (attached as Exhibit "D"). Exhibit 90, Summary Statement of Deficiencies, states that the failure of Leahi Hospital to remove the "sleepers" from nursing care for six days after they were found sleeping constituted a deficiency in the manner in which the sleeper incident was handled.

Other than the bold allegations of Plaintiff, there is no evidence before this Court that the Hospital reassigned Plaintiff to the Dietary Unit because she spoke against her employer. Even Plaintiff acknowledged at trial that reassignment was appropriate. Plaintiff attempted to retract that testimony, but acknowledged that even in the absence of evidence that neglect occurred at

the time the sleepers were found by Carlina Rivera, their removal from nursing care had been mandated by the Department of Health.

Therefore, even assuming, without admitting, that Plaintiff's speech was constitutionally protected, Defendants are still entitled to a directed verdict on this issue.

2. The Hospital Defendants did not violate Plaintiff's right to freedom of speech, because the Hospital's action that Plaintiff challenges *was justified.*

Even assuming, *arguendo*, Plaintiff's expression motivated the Hospital's challenged action, the Hospital Defendant is still entitled to a directed verdict on this issue because the Hospital's action was justified. As the *Crosby* court explained, albeit in dicta:

> Where a public employee's protected expression contributes to the employer's decision to take adverse action, the court must still determine whether the employer's decision was justified. *Crosby*, 876 P.2d at 1313, 76 Haw. at 345.

The *Crosby* court went on to explain:

> Such a determination requires a delicate balancing of the employer's legitimate interest in the effective and efficient fulfillment of its responsibilities to the public and the employee's right, as a private citizen, to participate in discussions concerning public affairs. *Crosby* at 1313, citing Connick, 461 U.S. at 150-154, 103 S.Ct. At 1692-1693.

The *Crosby* court first explained that "the Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs," and that "when someone who is paid a salary so that [he] will contribute to an agency's effective operation begins to ... detract from the agency's effective operation [by doing, saying, or failing to do certain things]." It then concluded that Crosby's employer's action was justified based on the facts before it:

> In the instant case, the balance of interests favors the State in light of the minimal burden on Crosby's First Amendment Rights. The State's action was not drastic, Crosby was not prohibited from speaking out, he was not discharged or otherwise disciplined, and the reason for his removal had not been made public. Under these circumstances, Crosby's First Amendment Rights must yield. *Crosby*, 876 P.2d at 1313.

In the instant case, the Hospital's action was not drastic. Rather, evidence is uncontroverted that it was consistent with the law, the applicable collective bargaining agreement, and its own policy, and the action was necessary to protect the interests of the **elderly** residents. Evidence is further uncontroverted that Plaintiff was not prohibited from speaking out. Plaintiff's counsel stipulated at Plaintiff's deposition that Plaintiff is not asserting a claim for prospective violation of her speech rights. It is further uncontroverted that no disciplinary action was taken against Plaintiff. Indeed, there is no dispute that she has been asked to return to Young 4 but it has been Plaintiff's decision not to return to Young 4.

Thus, the evidence in this case is susceptible of only one reasonable interpretation - that the Hospital's challenged action taken against Plaintiff was not only justified, but also not inconsistent with her right to freedom of speech. Therefore, as in *Crosby*, the balance of interests favors the Defendants in light of the minimal burden, if any, on Plaintiff's First Amendment Rights. Accordingly, Plaintiff's First Amendment claim fails as a matter of law, and Defendants are entitled to a directed verdict in their favor on this issue.

This Court need not engage in any separate analysis of Plaintiff's claim based on the alleged violation of her rights under the First amendment of the US Constitution and under Article I, Section 4 of the Hawaii Constitution. Article I, Section 4 of the Hawaii Constitution is nearly identical to the First Amendment for the protection of free speech, and thus the construction of the First Amendment of the U.S. Constitution applies to the construction of Article I, Section 4 of the Hawaii Constitution. *Estes v. Kapiolani Women's and Children's Medical Center,* 71 Haw. 190, 787 P.2d 216 (1990)("In construing Article I, Section 4 of our Hawaii Constitution we adopt the holdings of the federal cases construing the First Amendment rights to free speech of our U.S. Constitution"). Accordingly, the analysis of the claim of violation of freedom of speech is the same under the Hawaii Constitution and the U.S. Constitution. Where Plaintiff's claim under the First Amendment of the U.S. Constitution fails as a matter of law, her claim under the state constitution also fails as a matter of law.

3. Plaintiff must establish that her constitutional right was violated in order to prevail on her *claim based upon 42 U.S.C. Section 1983.*

42 U.S.C. Section 1983 allows a civil suit for damages when a person's civil rights are violated by a person who acts under color of law. It provides in its relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state ... subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to *the deprivation of any rights, privileges, or immunities secured by the constitution and laws,* shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress. (Emphasis added.)

Thus, unless a person's "rights, privileges, or immunities secured by the constitution and laws" are violated, liability under Section 1983 does not arise. In the instant case, Plaintiff's claim against Defendants for alleged violation of her rights under the First Amendment of the U.S. Constitution and Article I, Section 4 of the state constitution fails as a matter of law as set forth hereinabove. Therefore, Plaintiff's Section 1983 claim also fails as a matter of law.

C. AS A MATTER OF LAW, DEFENDANTS DID NOT VIOLATE HAWAII'S *WHISTLEBLOWER PROTECTION ACT (HWPA).*

For Plaintiff to prevail on her HWPA claim, she must prove that she has engaged in conduct protected under HWPA, and that the Hospital's alleged adverse action against Plaintiff was taken because she engaged in such protected "whistleblowing" conduct. H.R.S. Section 378-62 provides in its relevant part:

> An employer shall not discharge, threaten, or otherwise discriminate against an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment *because:* 1) The employee ... reports or is about to report to a *public body,* verbally or in writing, a violation or a suspected violation of a law or rule adopted pursuant to law of this State, a political subdivision of this State, or the United States, unless the employee knows that the report is false .... (Emphases added.)

1. Plaintiff did not engage in any protected conduct, because she did not report to any public body *within the meaning of HWPA.*

Under H.R.S. Section 378-62, in order for Plaintiff's conduct to be protected under HWPA, she must have reported, or was about to report, a violation or a suspected violation to a "public body" as defined in H.R.S. Section 378-61. As this Court has already ruled, the "media" is not a public body within the meaning of HWPA. Therefore, any report to the media (other than public television) is not protected conduct under HWPA.

Significantly, Plaintiff's second amended complaint primarily alleges her public statements to the media as the protected conduct. No matter how public, Plaintiff's report to the media is not a report to a "public body" which HWPA protects. As a matter of law, that her supervisor heard the news report or that a public body ultimately received information relating to a violation of law of the employer does not convert an otherwise unprotected conduct into a protected one. Obviously, in enacting HWPA, the legislature did not intend to protect employees who publicize the illegal conduct of the employers -- the clear language of the statute indicates that it intended to protect those who report to a "public body." Accordingly, Plaintiff's HWPA claim based upon her "public statement" to the media fails as a matter of law.

2. The Hospital did not transfer Plaintiff because of *Plaintiff's protected conduct, if any.*

However, even assuming, *arguendo*, Plaintiff engaged in a protected conduct, her HWPA claim still fails as a matter of law, because the evidence before this Court is susceptible of only one reasonable interpretation, that Plaintiff's alleged protected conduct was not a substantial or motivating factor in the Hospital's decision to transfer Plaintiff to the Dietary Unit. As the *Crosby* court explained:

> In order for an employee to prevail under the HWPA, however, the employer's challenged action must have been taken "because" the employee engaged in protected conduct .... In other words, a causal connection between the alleged retaliation and the "whistleblowing" is required. The HWPA's legislative history indicates that the legislature intended that the required burden of proof be similar to that utilized in traditional labor management relations discharge cases. Under the National Labor Relations Act, [] an employee has the burden of showing that his or her protected conduct was a "substantial or motivating factor" in the decision to terminate the employee.

Plaintiff as a matter of law fails to establish any causal connection between her protected "whistleblowing," if any, and the Hospital's action challenged by her. There is no evidence before this Court other than the blanket allegation by Plaintiff, that her whistleblowing was in any way a factor in the decision of the Hospital to take any action against Plaintiff.

Thus, the evidence before this Court is susceptible of only one reasonable interpretation, that Plaintiff was not transferred to the Dietary Department because of her whistleblowing. Therefore, the Hospital Defendants are entitled to a directed verdict in their favor on HWPA claim.

3. The Hospital would have transferred Plaintiff to the Dietary Unit regardless of whether or not she *engaged in protected whistleblowing.*

Even assuming, *arguendo*, Plaintiff's alleged whistleblowing was a motivating factor in the Hospital's decision to transfer her to the Dietary Unit, her HWPA claim still fails. An employer has a defense that it would have taken the challenged action regardless of the protected conduct of the employee. As noted in *Crosby*, once the employee's protected whistleblowing is shown to have played a role in the employer's decision to take the challenged action, then "[t]he employer can defend affirmatively by showing that the termination would have occurred regardless of the protected activity." *Crosby*, 876 P.2d at 1310.

In the instant case, it is uncontroverted that the Hospital would have reassigned Plaintiff regardless of whether or not she had in the past engaged in any protected whistleblowing. It was the report of **elderly** neglect which triggered the Hospital's action to transfer Plaintiff. There is no evidence before this Court, other than the assertions of Plaintiff, that she would not have been transferred had it not been for her whistleblowing.

The evidence at trial is consistent through testimony and the exhibits that Plaintiff's removal from nursing care was mandated once Plaintiff was suspected of having neglected a patient. There is no credible evidence that Plaintiff was reassigned because of her whistleblowing.

Therefore, the evidence is susceptible of only one reasonable interpretation, that there is no causal nexus between Plaintiff's whistleblowing and any action against Plaintiff taken by the Hospital. Accordingly, the Hospital Defendants are entitled to a directed verdict on this issue.

4. Plaintiff's reporting of the alleged "sleepers" *does not form any basis for a claim under HWPA*.

Plaintiff appears to argue that her reporting the alleged "sleepers" forms a basis for her HWPA claim. The argument has no merit. Assume, *arguendo,* that her reporting the alleged sleepers led alleged sleepers to retaliate against her by reporting that she neglected an **elderly** resident. Such retaliation is irrelevant, because retaliation by co-employees falls outside the scope of HWPA. The clear language of the statute prohibits employers from retaliating:

> An *employer* shall not discharge, threaten, or otherwise discriminate against an employee ... because ... [t]he employee ... reports ... to a public body ... a violation .... HRS Section 378-62 (emphasis added).

HWPA does not address the issue of retaliation by co-employees. Thus, whether there was a violation of HWPA ultimately rests not on whether Plaintiff's co-employees retaliated against her, but whether her employer retaliated against her upon receipt of the alleged retaliatory report of neglect from the co-employees. Even assuming, without admitting and merely for the sake of argument, the conduct of her co-employees was retaliatory, HWPA claim still fails if the employer's conduct does not violate the mandates of HWPA. In short, reporting the alleged "sleepers" in this case is a proverbial red herring. Therefore, as a matter of law, Plaintiff's HWPA claim based on her reporting of the alleged "sleepers" fails.

D. PLAINTIFF'S CIVIL CONSPIRACY CLAIM FAILS BECAUSE THE *UNDERLYING CLAIMS FAIL*.

It is well established in Hawaii that there is no civil claim based upon a conspiracy alone -- there must be an actionable underlying claim. As noted by the Hawaii Supreme Court in *Ellis v. Crockett,* 51 Haw. 45, 57, 451 P.2d 814 (1969):

> Although the tort of 'conspiracy' has not been clearly defined, it is clear that there can be no civil claim based upon a conspiracy alone. *Corris v. White,* 29 App.Div.2d 470, 289 N.Y.S.2d 371, 374 (1968). Since the complaint in this case has not set forth any actionable claim based upon deceit, there can be no claim against any alleged joint tortfeasor based solely upon conspiracy to deceive.

In the instant case, because the underlying First Amendment and HWPA claims fail for reasons stated in the foregoing, Plaintiff's conspiracy claim based on those underlying claims also fails.

E. PLAINTIFF'S DEFAMATION CLAIM FAILS BECAUSE THE ALLEGED DEFAMATORY PUBLICATION IS PRIVILEGED AS A MATTER OF *LAW*.

Under *Dunlea v. Dappen,* 83 Hawai'i 28, 32, 924 P.2d 196 (1996), in order to prevail on her defamation claim, Plaintiff must prove, among other things, that there was "an unprivileged publication" of a false and defamatory statement concerning her to a third party. See also *Beamer v. Nishiki,* 66 Haw. 572, 578-579, 670 P.2d 1264, 1271 (1983). Privileged statements do not give rise to a defamation claim. "Whether a communication is privileged is to be determined by the court." *Vlasaty v. Pacific Club,* 4 Haw. App. 556 (1983)(citations omitted), 670 P.2d 827, 832.

As a matter of law, the statements made by the Defamation Defendants which form the basis for Plaintiff's defamation claim were qualifiedly privileged. The issue of qualified privilege in a defamation suit was addressed in *Vlasaty*. In that case, plaintiff Vlasaty, a terminated manager of a private club, sued the club and its president, alleging that they defamed him when they accused him of stealing. The trial court granted summary judgment in favor of the defendants on the defamation claim. The Intermediate Court of Appeals affirmed, holding that the alleged defamatory publication was as a matter of law qualifiedly privileged, and that there was no **abuse** of that privilege. In so holding, the *Vlasaty* court explained:

> A qualified privilege [] arises when the author of the defamatory statement reasonably acts in the discharge of some public or private duty, legal, moral, or social, and where the publication concerns subject matter in which the author has an interest and the recipients of the publication a corresponding interest or duty.[] In claiming such privilege, it is essential that the author of the defamatory matter and the recipients have a common interest and the communication is of a type reasonably deemed to protect or further that interest.

In analyzing the facts, the *Vlasaty* court first noted that the president who accused Vlasaty had a private duty to protect the interests of the club and its members. It then noted that in all instances of defamatory conduct alleged by Vlasaty, the person making the alleged defamatory statement and the persons receiving it "had a common interest in the subject matter" of such statements which concerned the conduct of the club's affairs. 670 P.2d at 832 (citations omitted). The *Vlasaty* court then concluded that the alleged defamatory statements were qualifiedly privileged.

In the instant case, the statements which form the basis for Plaintiff's defamation claim are statements made in relation to the reported incidence of **elderly** neglect. Importantly, the employees of the Hospital who made those statements had a legal duty to report any incidence of **elderly** neglect, [2] and were acting reasonably in the discharge of that duty.

Not only was there a clear legal duty to report the incidence of **elderly** neglect, there was also a social and moral duty to report the neglect. Public policy that underlies the legislation which imposes criminal penalty for failure to make a report of **abuse** or neglect of the **elderly**, and which immunizes those who make such a report, is to protect the **elderly**:
The legislature recognizes that citizens of the State who are **elders** and mentally or physically impaired constitute a significant and identifiable segment of the population and are particularly subject to risks of **abuse**, neglect, and exploitation.

... Substantial public interest exists to ensure that this segment of the population receives protection. HRS Section 346-221.

Therefore, even if the court concludes that the reports of **elderly** neglect do not fall squarely within the scope of the statutorily required reports, there is still no question that an employee of a health care facility has a social and moral duty to report any incidence of **elderly** neglect. Furthermore, there is also a duty to report based on hospital policies, and other rules and regulations which apply to the Defamation Defendants. Exhibit 14, the Policies & Procedures follows the language of H.R.S. Section 346-224 almost verbatim in requiring Leahi Hospital's health care employees to report circumstances which may constitute patient neglect.

Also, Defendants who made the alleged defamatory statements and the recipients (employees of the hospital, the state department of health, and state Department of Human Services) all shared a common interest and duty to protect the **elderly**. It is uncontroverted that they also all shared a common interest in the effective operation of the Hospital and delivery of health care.

Plaintiff admits that she failed to attend to a patient, which failure constitutes neglect under all applicable definitions of "neglect" in evidence. The only factual dispute is whether Plaintiff's neglect of a resident occurred on December 23, 1996 or December 29, 1996. This factual difference is legally insignificant in determining whether the Defamation Defendants' conduct was privileged.

Thus, Defamation Defendants acted reasonably in the discharge of their legal, social, and moral duty when they made their allegedly defamatory reports, and they and the recipients of the alleged defamatory reports shared a common interest and duty

in their subject matter. Therefore, under *Vlasaty*, as a matter of law, Defendants alleged defamatory statements were qualifiedly privileged.

As noted by the *Vlasaty* court, "[t]he qualified privilege is conditional and is lost if it is **abused**." 670 P.2d at 833 (citations omitted). Whether the Defendants **abused** the privilege is a question of fact for the jury, but disposition as a matter of law is appropriate where there is no genuine issue of material fact. *Id.* In the instant case, other than the blanket allegations of Plaintiff, there is no evidence of bad faith or **abuse** of privilege before this Court. Accordingly, Defamation Defendants are entitled to directed verdict in their favor.

F. BASED ON EVIDENCE BEFORE THIS COURT, DEFENDANTS ARE ENTITLED TO DIRECTED VERDICT ON THE ISSUE OF PUNITIVE *DAMAGES.*

Hawaii law on punitive damages is stated in *Masaki v. General Motors Corp.*, 71 Haw. 1 (1989), 780 P.2d 566:

> [F]or ... punitive damage claims we adopt the clear and convincing standard of proof. The Plaintiff must prove by clear and convincing evidence that the defendant has acted wantonly or oppressively or with such malice as implies a spirit of mischief or criminal indifference to civil obligations, or where there has been some wilful misconduct or that entire want of care which would raise the presumption of a conscious indifference to consequences. (Citations omitted).

See also, Amfac, Inc. v. Waikiki Beachcomber Inv. Co., 74 Haw. 85, 839 P.2d 10 (1992).

There is no evidence before this Court, certainly no clear and convincing evidence, that alleged acts or omissions of any of the Defendants rose to the level of wrongdoing required under Hawaii law for the imposition of punitive damages. Therefore, as a matter of law, Defendants cannot be held liable for punitive damages on the basis of the evidence adduced by Plaintiffs.

G. BASED ON THE LACK OF EVIDENCE TO SUPPORT ANY CLAIM FOR WAGE LOSS AND LOSS OF EMPLOYMENTS BENEFITS, DEFENDANTS *ARE ENTITLED TO DIRECTED VERDICT ON THIS ISSUE.*

It is well-settled that damages may not be awarded based on speculation. Plaintiff testified that she has lost overtime and seniority; however, she has totally failed to provide any proof of the amount thereof, if any. As a matter of law, the finder of fact may not be allowed to award damages based on Plaintiff's unsupported assertion that she has lost wages, seniority, overtime, and other employment benefits. To do so would be speculation. Directed Verdict for Defendants on this issue is proper.

V. *CONCLUSION.*

For the foregoing reasons, Defendants respectfully request that this Court grant the instant motion for directed verdict against Plaintiff and in favor of all the Defendants on all the claims asserted by Plaintiff.

DATED: Honolulu, Hawaii, MAY 3 1999.

<<signature>>

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Footnotes

1 Mrs. Sugimoto testified that she interviewed Defendants Carlina Rivera, Encarnacion Castro, Lani Castillo, Carmelita Rodriguez.
Q: And can you tell us, based upon your review of that deposition of youself in 1998, who you interviewed?
A: Vicky Bacayan, Carlina Rivera, Encarnacion Castro, Gloria DeFrancia, Lani Castillo, Carmelita Rodriguez.
4/22/99: 69: 3-8 (attached as Exhibit “B”).

2 H.R.S. § 346-224; H.R.S. 346-222.

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